(3)

No. 84-1427

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

STEVEN D. SIMON,

Petitioner,

vs.

THE KROGER CO. and
GENERAL TEAMSTERS LOCAL 528,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT THE KROGER CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JEFFERSON D. KIRBY, III
PAUL D. JONES
FORD & HARRISON
600 Peachtree at the Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

18 pp

QUESTIONS PRESENTED

1. Whether the Eleventh Circuit correctly determined that the limitations period set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b), specifying that a charge must be filed and served within six months, requires that a complaint alleging that an employer has breached its collective bargaining agreement and that a union has violated its duty of fair representation be served within six months.

2. Whether the Eleventh Circuit correctly determined that the District Court had properly interpreted its own Local Rule 91.2 in ruling that the failure of Steven D. Simon to file a timely response to the motion for summary judgment indicated that that motion was unopposed.

TABLE OF CONTENTS

	Page
Statement of the Case	1
The Proceedings Below	2
Reasons for Denying the Writ	5
I. Section 10(b) Requires Service Within Six Months	6
II. Failure To Comply With Local Rule 91.2	9
Conclusion	11

TABLE OF AUTHORITIES

CASES

	Page
Allen v. United States Fidelity & Guaranty Co., 342 F.2d 951 (9th Cir. 1965)	10
Biby v. Kansas City Life Insurance Co., 629 F.2d 1289 (8th Cir. 1980)	9
Caldwell v. Martin Marietta Corp., 632 F.2d 1184 (5th Cir. Unit B 1980)	7
DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983)	3, 6, 9
Dunlap v. Lockheed-Georgia Co., Case No. 84-8329 (11th Cir. 1984)	9
George D. Auchter Co., 102 NLRB 881 (1953), *enf'd*, 209 F.2d 273 (5th Cir. 1954)	7
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984)	7
Hoffman v. United Markets, Inc., 117 L.R.R.M. (BNA) 3229 (N.D. Cal. 1984)	9
Howard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984)	9
Isaacks v. Jeffers, 144 F.2d 26 (10th Cir.), *cert. denied*, 323 U.S. 781 (1944)	7
Messinger v. United States, 231 F.2d 328 (2d Cir. 1956)	8
Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gasoline Co., 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383 U.S. 925 (1966)	7, 9
NLRB v. Friedman-Harry Marks Clothing Co., 83 F.2d 731 (2d Cir. 1936)	7

NLRB v. Local 264, Laborers' International Union, 529 F.2d 778 (8th Cir. 1976) 6

Old Colony Box Co., 81 NLRB 1025 (1949) .. 6

Transamerica Corp. v. Transamerica Bancgrowth Corp., 627 F.2d 963 (9th Cir. 1980) . 9

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981) 3, 6

United States v. Matles, 356 U.S. 256 (1958) . 8

United States v. Simmons, 476 F.2d 33 (9th Cir. 1973) 9

United States v. Wahl, 583 F.2d 285 (6th Cir. 1978) 8

United States Fidelity & Guaranty Co. v. Lawrenson, 334 F.2d 464 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964) 10

Williams v. E. I. duPont de Nemours & Co., 581 F. Supp. 791 (M. D. Tenn. 1983) 8

Woods Construction Co. v. Atlas Chemical Industries, Inc., 337 F.2d 888 (10th Cir. 1964) 9

STATUTES

28 U.S.C. § 2071 9

29 U.S.C. § 160(b) 4, 6, 8, 9

29 U.S.C § 185 ..... 2, 3, 6, 7, 10

RULES AND REGULATIONS

Federal Rules of Civil Procedure
Rule 3 9
Rule 4 ..... 7, 10

Rule 83 9

Local Rules of the United States District Court For the Northern District of Georgia
Rule 91.2 (repealed) 4, 5
Rule 220-1(b)(1) 5

29 C.F.R. § 102.113(a) 7

MISCELLANEOUS

2 Moore's Federal Practice (2d ed. 1984) 8

4 C. Wright & A. Miller, Federal Practice and Procedure (1969) 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. 84-1427

STEVEN D. SIMON,

Petitioner,

vs.

THE KROGER CO. and
GENERAL TEAMSTERS LOCAL 528,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF RESPONDENT THE KROGER CO. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

Steven D. Simon was initially employed by The Kroger Co. as a warehouseman on September 6, 1978. In October, 1979, Simon became a member of the General Teamsters Union, Local 528 and was subject to the collective bargaining agreement between Kroger and that Union (R 5).[1]

On February 18, 1982, Simon was discharged by Kroger for carelessness, failure to follow instructions

---

[1] References to the record are cited as "R ___", while "Appx. ___" denotes citations to the Appendix to the Petition for a Writ of Certiorari.

and deplorable work quality (R 30, 33, 39). After a grievance was filed and processed in accordance with the collective bargaining agreement, a joint Kroger-Union hearing was held in Chicago on May 25, 1982 (R 30, 33, 39, 63-64, 66-68). A decision denying Simon's grievance was subsequently issued pursuant to the terms of the bargaining agreement, and Simon received a copy of that decision on July 6, 1982 (R 31, 33-34, 39, 69).

The complaint in this matter was filed in the United States District Court for the Northern District of Georgia on January 3, 1983, alleging that Kroger had breached its collective bargaining agreement by discharging him and that the Union had violated its duty of fair representation by failing to represent him properly in connection with his grievance. The jurisdiction of the Court was invoked pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185 (R 3).

More than six months after Simon had been notified of the denial of his grievance, on January 12, 1983, a copy of that complaint was served on Kroger, and, on January 26, 1983, the Union was served with the complaint (R 10, 11).

THE PROCEEDINGS BELOW

Kroger filed its motion for summary judgment on June 10, 1983, noting that the action was barred by the applicable statute of limitations (R 33).[2] In support of that motion, Kroger relied on *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), in which the appropriate limitations period for suits brought under 29 U.S.C. Section 185 was determined to be the period during which a party could move for vacation of an arbitration award under state law.

[2] The Petitioner's representation that Kroger's motion was initially filed on July 5, rather than June 10, is patently erroneous (Petition, pp. 5, 15) and conflicts with the specific findings of the District Court and the Eleventh Circuit that "Simon failed to respond to Kroger's motion for summary judgment until almost three months after a response was required under Local Rule 91.2" (Appx. A-5, B-1, C-1).

While that motion was pending, the decision in *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), was published. Accordingly, on July 5, 1983, Kroger filed a supplemental brief in support of its motion for summary judgment (R 134).

Without seeking an extension of time within which to respond or leave to file an untimely brief, Simon filed a brief in opposition to the motion on September 6, 1983, almost three months after the motion was originally filed and more than two months after the filing of Kroger's supplemental brief. No explanation for the delay was offered in Simon's response (R 139).

On September 27, 1983, the District Court granted Kroger's motion for summary judgment. As the complaint had not been served on Kroger within six months as required by Section 10(b) of the National Labor Relations Act, the action was time-barred. The District Court additionally ruled that the motion was to be considered unopposed in accordance with Local Rule 91.2 of the Rules of the United States District Court for the Northern District of Georgia (Appx. B-1).

After having filed a motion for reconsideration of the District Court's ruling, Simon, on November 23,

1983, first presented an excuse for having failed to comply with Local Rule 91.2. Rather than filing a response to the original summary judgment motion within twenty days as required by that Rule, Simon claimed to have "waited until he had, what he believed to be, a well thought out response before filing the same" (R 250). Citing "a duty . . . to refrain from filing a brief until he ha[d] thoroughly familiarized himself with the law and the facts and to not burden the system with meritless propositions" (R 254), Simon asserted that he had simply complied with that duty by having filed no response to the summary judgment motion.

In denying the request for reconsideration, the District Court, in an order dated December 22, 1983, noted that Simon had not "offered an explanation for his failure to seek an extension of the response time or leave to file an untimely response" (Appx. C-1). Concluding that its original decision concerning the application of Local Rule 91.2 was correct, the District Court stated that Simon's "apparently conscious decision to delay [his] response for more than two months strains the spirit of the federal rules to, if not beyond, the breaking point" (Appx. C-2).

The District Court also reconfirmed its previous holding that Section 10(b) requires that a complaint be filed and served within six months (Appx. C-2). Subsequently, on January 31, 1984, the District Court granted a separate summary judgment motion made by the Union, finding that the complaint had not been served within six months on that defendant either (Appx. D-1).

On October 15, 1984, the United States Court of Appeals for the Eleventh Circuit affirmed these rulings

(Appx. A-1), and a petition for rehearing and suggestion for rehearing en banc was denied on December 6, 1984 (Appx. F-1).

REASONS FOR DENYING THE WRIT

With no conflict among the Circuit Courts as to any of the questions presented, the Petitioner seeks to have this Court devote its resources to considering the unique factual issues presented here. For instance, without challenging the authority of the District Court to maintain and enforce its Local Rules, the Petitioner requests this Court to determine whether the application and interpretation of Local Rule 91.2 was proper in the particular circumstances involved in this case.

Not only would such a factual determination be wholly inconsequential outside the Northern District of Georgia, but the resolution of this matter would have little significance even locally. Local Rule 91.2 and all previous rules of the United States District Court for the Northern District of Georgia were rescinded and superseded by another set of Local Rules, effective January 1, 1985.[3] Virtually no one other than the litigants to this action could be affected by this Court's consideration of whether the now-repealed Local Rule 91.2 has been applied properly in this case.

Nor would another review by this Court of the appropriate limitations period in hybrid Section 301 ac-

---

[3] While the requirements of former Local Rule 91.2 have been retained in Local Rule 220-1(b)(1) of the new Rules of the United States District Court for the Northern District of Georgia, the Petitioner does not claim that such rules are in any way improper or invalid. Instead, the Petitioner only suggests that former Local Rule 91.2 should not have been invoked by that Court in this particular case.

tions be of any special importance to anyone not involved in this action. The factual situation presented here involving a complaint filed, but not served within the statutory six-month period, has arisen only infrequently, and, as this Court has considered the issue of the appropriate limitations period in such cases twice in the past four years in both *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), and *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981), these issues cannot warrant further review.

In any event, these same issues were fully considered and correctly decided by both the Eleventh Circuit and the District Court. As the Petitioner's arguments are meritless, the petition for a writ of certiorari should be denied.

I. Section 10(b) Requires Service Within Six Months

In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court ruled that the applicable limitations period for purposes of a hybrid Section 301 suit is set forth in Section 10(b) of the National Labor Relations Act, 29 U.S.C. Section 160(b). That provision expressly requires service of an unfair labor practice charge within six months.

In interpreting Section 10(b), both the NLRB and the Courts have consistently ruled that such charges must be both filed and served within the statutory six month period. *NLRB v. Local 264, Laborers' International Union*, 529 F.2d 778, 782 (8th Cir. 1976) ("the statute is clear in providing that a charge must not only be filed, it must also be served within the prescribed six month period"); *Old Colony Box Co.*, 81 NLRB 1025, 1027 (1949) ("the charge must have been

filed and a copy thereof actually served upon the party against whom it was made within 6 months").

While conceding that Section 10(b) applies here, the Petitioner asserts that the service requirements of the statute apply only in administrative proceedings conducted by the NLRB. According to the Petitioner, the NLRB rules authorizing service by mail, 29 C.F.R. Section 102.113(a), somehow demonstrate that the statutory service requirement is inapplicable here. That argument ignores not only NLRB case law developed prior to the promulgation of that rule which specified that service was complete upon actual receipt (*NLRB v. Friedman-Harry Marks Clothing Co.*, 83 F.2d 731 (2d Cir. 1936); *George D. Auchter Co.*, 102 NLRB 881, 883 n. 8 (1953), *enf'd.*, 209 F.2d 273, 275 (5th Cir. 1954)), but also the means of perfecting service by mail under Rule 4 of the Federal Rules of Civil Procedure.

The Petitioner does not cite a single case involving the application of a limitations period comparable to Section 10(b), instead relying exclusively upon cases indicating that an action is generally commenced at the time a complaint is filed. Where no additional statutory requirements are applicable, service need not be accomplished in order to toll the statute of limitations, and the cases cited by the Petitioner apply that general rule. With a statute of limitations simply requiring that an action be "brought" (*Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984); *Caldwell v. Martin Marietta Corp.*, 632 F.2d 1184 (5th Cir. Unit B 1980); *Issacks v. Jeffers*, 144 F.2d 26 (10th Cir.), *cert. denied*, 323 U.S. 781 (1944)), "commenced" (*Moore Co. of Sikeston, Mo. v. Sid Richardson Carbon & Gasoline Co.*, 347 F.2d 921 (8th Cir. 1965), *cert. denied*, 383

U.S. 925 (1966); *Messinger v. United States*, 231 F.2d 328 (2d Cir. 1956)), or "filed" (*United States v. Wahl*, 583 F.2d 285 (6th Cir. 1978)) within a prescribed period, the mere filing of the complaint tolls the statute.[4] Unlike those statutes, Section 10(b) expressly requires both filing and service within six months, and those cases are inapposite here.

Where a federal statute imposes additional requirements in order to commence an action, the filing of a complaint without satisfying those additional prerequisites cannot toll the limitations period. *United States v. Matles*, 356 U.S. 256 (1958) (where an affidavit of good cause is a statutory prerequisite to commencing an action, a timely-filed complaint without such an affidavit did not toll the limitations period, and this defect could not be cured by amendment); *2 Moore's Federal Practice* ¶ 3.04, p. 3-21 (2d ed. 1984).

Here, Section 10(b) requires not only filing, but also service of a complaint within six months. Nothing in *DelCostello* indicates that this Court intended for only a portion of that statute to apply to Section 301 actions, and each of the courts expressly considering the issue has agreed that the service requirements of that limitations period are applicable to such suits.[5] *How-*

[4] Contrary to the Petitioner's assertion, Rule 3 of the Federal Rules of Civil Procedure "simply provides that an action is commenced by filing the complaint and has as its primary purpose the measuring of time periods that begin running from the date of commencement; the rule does not state that filing tolls the statute of limitations." *4 C. Wright & A. Miller, Federal Practice and Procedure* § 1057, p. 191 (1969).

[5] While *Williams v. E.I. duPont de Nemours & Co.*, 581 F. Supp. 791 (M.D. Tenn. 1983), did apply only the filing requirements of Section 10(b), there is no indication that the service requirements of the statute were considered by the Court. Rather,

ard v. Lockheed-Georgia Co., 742 F.2d 612 (11th Cir. 1984); *Dunlap v. Lockheed-Georgia Co.*, Case No. 84-8329 (11th Cir. 1984); *Hoffman v. United Markets, Inc.*, 117 L.R.R.M. (BNA) 3229 (N.D. Cal. 1984). As service was not accomplished within the statutorily prescribed period, the decision of the Eleventh Circuit was correct, and the petition for a writ of certiorari should be denied.[6]

II. Failure To Comply With Local Rule 91.2.

Title 28 U.S.C. Section 2071 and Rule 83 of the Federal Rules of Civil Procedure expressly authorize district courts to adopt local court rules. *Transamerica Corp. v. Transamerica Bancgrowth Corp.*, 627 F.2d 963 (9th Cir. 1980). Once adopted, such local rules of practice are binding upon parties in actions before the courts, and they have the force and effect of law. *Biby v. Kansas City Life Insurance Co.*, 629 F.2d 1289 (8th Cir. 1980); *Woods Construction Co. v. Atlas Chemical Industries, Inc.*, 337 F.2d 888 (10th Cir. 1964). Such rules are primarily promulgated to promote the efficiency of the district courts, and those courts have a large measure of discretion in interpreting and applying them. *United States v. Simmons*, 476 F.2d 33 (9th Cir. 1973). A district court "is, of course, the best

that Court decided that the plaintiff's having purposely avoided serving the complaint on the defendants did not trigger the statute of limitations after the complaint had been filed, and no mention of the specific Section 10(b) service requirement is contained in that opinion.

[6] The Petitioner's contention that having to serve a complaint within the prescribed six-month period unduly curtails the statute of limitations is meritless. In a Section 301 action, with neither his employer nor his union being a stranger to the plaintiff, service can be accomplished expeditiously under Rule 4.

judge of its own rules." *United States Fidelity & Guaranty Co. v. Lawrenson*, 334 F.2d 464, 467 (4th Cir.), *cert. denied*, 379 U.S. 869 (1964).

Having admittedly failed to comply with the local rules of the Court, the Petitioner apparently believes that such deliberate violations must be sanctioned. *See Allen v. United States Fidelity & Guaranty Co.*, 342 F.2d 951, 954 (9th Cir. 1965) ("It is for the court in which a case is pending to determine . . . what departures from . . . rules of court are so slight and unimportant that the sensible treatment is to overlook them.").

The Petitioner's "conscious decision to delay its response for more than two months" in direct contravention of the local rules was neither slight nor unimportant. Even now, he has offered no explanation for his failure to seek an extension while the motion was pending nor can he justify not requesting leave to file an untimely brief. Such purposeful violations warrant the imposition of the sanctions specified in the local rules, and, accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, the Respondent Kroger respectfully submits that a writ of certiorari should not be granted in this case.

Respectfully submitted,

By: /s/ Jefferson D. Kirby, III
JEFFERSON D. KIRBY, III
PAUL D. JONES
600 Peachtree at The Circle Building
1275 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 888-3800

Attorneys for Respondent
The Kroger Co.